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ABSTRACT

This edition of the newsletter of the National Information Center for Handicapped Children and Youth explains the procedural safeguards provided by Public Law 94-142, the Education for All Handicapped Children Act, to insure that each eligible child receives a free appropriate public education. Individual sections have the following titles: "Procedural Safeguards Insuring that Handicapped Children Receive a Free Appropriate Public Education"; "How Parents and Educators Make Decisions Together and How Disputes Arise"; "Requirements for Parent Participation"; "Other Methods for Obtaining Compliance"; "Organization of the Due Process Hearing System"; "Requesting a Due Process Hearing"; "Designation of a Hearing Officer"; "Pre-Hearing Procedures"; "The Hearing"; "Hearing Decision"; "State Educational Agency Impartial Review"; "Review by State and Federal Courts"; "Attorney's Fees"; and "Child's Status during Hearings." (DB)

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News Digest
Information from the National Information Center for Handicapped Children and Youth
1987 NUMBER 7

Procedural Safeguards Insuring that Handicapped Children Receive a Free Appropriate Public Education

by Martin Gerry, J.D.

One of the most important features of Public Law 94-142 (P.L. 94-142)* is the direct involvement of parents in the important decisions about their children's educations. Indeed, the law makes parents full partners with local school administrators and teachers in making sure that a free appropriate public education (FAPE) is available to each eligible child. The National Information Center for Handicapped Children and Youth (NICHCY) receives inquiries from parents seeking information that will help them to participate effectively as partners with teachers and administrators. The questions cover a variety of topics in special education including testing, placement, and the best practices in teaching children with disabilities.

Most of the time, parents are able to come to an agreement with educators about special education eligibility, appropriate programming, and placement. However, in some cases, a due process hearing may be necessary in order to resolve disagreements about special education decisions. The purpose of this issue of *News Digest* is to explain the procedural safeguards provided by P.L. 94-142 to insure that each eligible child receives a free appropriate public education (FAPE).

*The Education of the Handicapped Act (EHA), as amended by Public Law 94-142 in 1975, Public Law 98-199 in 1983 and P.L. 99-457 in 1986. Copies of these statutes and the regulations implementing them are available by writing:
National Information Center for Handicapped Children and Youth (NICHCY)
P.O. Box 1492
Washington, DC 20013

How Parents and Educators Make Decisions Together and How Disputes Arise

The provisions that require the involvement of parents were written into the law because legislators recognized that parents have a special insight into their children's needs, parents can learn through involvement in making decisions about their children, and, most importantly, children benefit when parents and educators work together.

Parental participation in educational decisionmaking is a hallmark of the P.L. 94-142 legislative strategy to insure equal educational opportunity for handicapped children. Within the statute itself, Congress recited the past failures of local school systems to provide appropriate education to handicapped children (including the exclusion from the public schools of over 1,000,000 children). Unlike some other civil rights statutes (such as Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972) and other formula grant education programs (such as Chapter 1), P.L. 94-142 relies almost entirely on parent/school dialogue and joint decisionmaking to insure the full protection of the rights of each handicapped child. While the Act provides detailed procedural guidance on how this dialogue and decisionmaking are to proceed, the important questions are left for the parents and school administrators to decide with only very general statutory guidance.

There are situations, however, when parents and school personnel find it difficult to reach an agreement on special education decisions. Observers have identified a number of different reasons why this is so. Among these reasons are:

1. Parents are frequently reluctant to participate because they are not sure they are qualified to play an active role. School officials can overcome this reluctance by sharing information about the child and his or her needs.

2. Parents and teachers may lack the communication skills needed to cooperate effectively. Rotter and Robinson (1982) summarize the research on effective parent-teacher conferencing. The authors include a section on skills for effective communication. While this booklet was written for teachers, much of what the authors say can be put to use by parents.

3. There is a tendency for some school systems to approach, in a very informal way, the making of decisions about placement of students with disabilities. This informality can lead

to conflict when parents feel that decisions have been made without careful consideration of their children's needs. Tucker (1980) discusses a 19 step process for assessment and placement of children with disabilities. The system is aimed at insuring that placement decisions are free from bias and that parents are informed decisionmakers. It also provides for opportunities to involve parents at various stages of the process.

4. Parents and educators may have established a full partnership in dealing with special education decisions, yet may disagree on specific decisions.

5. Previous experiences can also make it difficult for parents and educators to cooperate. By the time a child with a disability enters school his or her parents may have already experienced great difficulty getting appropriate services. As a result of that experience, parents may have developed a distrust of professionals. Likewise, teachers may find it difficult to be receptive to parents' views because of the stresses they are experiencing as part of their jobs. Both parents and teachers may be at the point where stresses in their situations make effective communication very difficult.

6. Educators sometimes do not view parents as equal partners in the decisionmaking process. When parent participation is seen only as a legal requirement, communication can quickly break down. Mutual respect and open communication between educators and parents will facilitate the special education decisionmaking process.

The purpose of the parent/school dialogue and decisionmaking is to insure that the child receives a free appropriate public education in the Least Restrictive Environment. The genius of the statutory approach is that the child is provided with two advocates who each act as an independent check on the other. Thus, where disagreements or disputes arise they should be focused on the child's best interests with both parents and school officials seen as equally responsible for protecting those interests. Parents should be aware that school districts have a statutory obligation to be a co-child advocate.

Requirement for Parent Participation

To implement the concept of cooperation between parents and educators, P.L. 94-142 establishes procedures that are to be followed when certain important decisions are made, including: 1) the initial evaluation and assessment; 2) diagnosis and determination of eligibility for special education services; 3) choice of the educational services to be provided (Individualized Educational Programs) (IEP); 4) placement in the Least Restrictive Environment in which the services can be provided; 5) review and updating on a periodic basis of educational plans, evaluations, and placement decisions; and 6) allowing access to confidential information.

The procedural safeguards provided in the law require the following actions:

1. Written notice is to be given to parents before the school initiates, changes, or refuses to initiate or change the identification or educational placement of a child.

2. Direct participation by parents in the development of the individualized educational program (IEP) and periodic review, at least annually, of the IEP.

3. Written, informed parental consent is obtained before the school conducts a formal evaluation and assessment and before initial placement in a program providing special education and related services. Note: Written parental consent is required for initial evaluation and initial placement. Subsequent formal evaluation and placement actions require written notice described in item 1 above.

4. Inspection and review by parents of any educational records maintained by the school district or other agency providing service under P.L. 94-142. Access to educational records will be granted to parents without unnecessary delay and before any meeting regarding an individualized education program or before a hearing relating to identification, evaluation, or placement of the child, and in no case, more than 45 days after the request has been made.

In addition, a parent may request, and the school district must provide, information on where independent educational evaluations may be obtained. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the local school district or responsible public agency. However, the local school district or responsible public agency may initiate a due process hearing to show the original evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense. The results of an independent evaluation obtained by the parents at private expense will be considered by the local school district in any decisions about the provision of a free appropriate public education to the child. Such results may also be presented as evidence at a due process hearing.

Other Methods for Obtaining Compliance

Before discussing the specific due process hearing procedures which are established by P.L. 94-142, it is important to note that the initiation of a due process hearing is not the only option available to parents who believe that a school district has failed to comply with a P.L. 94-142 requirement or who object to a proposed action which the school district wishes to take.

Sections 780-782 of the U.S. Education Department General Administrative Regulation (34 C.F.R. 76) provide that the SEA must adopt written procedures for "receiving and resolving any complaint that a State or subgrantee is violating a Federal statute or regulations that apply to a program." Because local school districts receive Federal money under P.L. 94-142, they are considered subgrantees. As a result, a parent who believes that a local school district has violated, or is about to violate, a P.L. 94-142 requirement, has a right to file a complaint with the SEA. The complaint must describe how the school district (or State agency) has violated P.L. 94-142 or the P.L. 94-142 Regulation. The SEA must investigate and resolve the complaint within sixty (60) days after receiving it (unless

unusual factors call for an extension). The SEA may, if necessary, conduct an independent onsite investigation. A parent who is not satisfied with the SEA's resolution of the complaint has the right to request a review by the U.S. Secretary of Education. The principal advantage of this method is that a decision must be made in 60 days.

Another way of challenging school district actions is through the filing of an administrative or judicial complaint under Section 504 of the Rehabilitation Act of 1973. Section 504 prohibits discrimination on the basis of handicap in the operation of programs receiving Federal financial assistance. The Department of Education, like other federal agencies which fund or operate programs which directly benefit individuals, has issued regulations which tell agencies receiving funds what they must do in order to comply with the law. Like P.L. 94-142, the Section 504 regulations for programs of the Department of Education (34 C.F.R. 104) require that local school districts provide a free appropriate public education to school-age children with disabilities.

The requirements of the Section 504 regulations closely resemble the provisions of P.L. 94-42. In many instances a violation of one is a violation of the other. However, the regulations differ in the following ways: 1) the definition of a handicapped child, and 2) the definition of free appropriate public education.

Another important consideration is that groups of parents who wish to complain *as a group* about the treatment of their children may sue under Section 504. The due process procedures under P.L. 94-142 are only available for individual complaints.

In the past there had been a dispute over whether parents could go directly to Federal court without first using the due process procedure under P.L. 94-142. The Handicapped Children's Protection Act of 1986 now requires that where parents can sue under Section 504 and P.L. 94-142, they must first use the due process procedures available under P.L. 94-142 before they file suit under Section 504. Parents who win their case under Section 504 may also be awarded attorney's fees.

"Another way of challenging school district actions is through the filing of an administrative or judicial complaint under Section 504 of the Rehabilitation Act of 1973. Section 504 prohibits discrimination on the basis of handicap in the operation of programs receiving Federal financial assistance."

Organization of the Due Process Hearing System

In the event that the parents and the school system are unable to reach agreement, either one may file a complaint which will lead to a due process hearing. P.L. 94-142 permits states to organize the due process hearing system in one of two ways. Under the first choice, State Educational Agencies (SEAs) may conduct a hearing (one-tier approach). The decision may then be appealed to a State or Federal court. The second choice allows the local school district (or other public agency educating the child) to conduct a hearing. The decision then may be appealed to the SEA for state-level review, and then the state-level decision may be appealed to a State or Federal court (two-tier approach).

A majority of states use the second approach, but a significant number use the first. Readers wishing to find out which approach their state uses should contact the office of the State Director of Special Education. For the address of this official in your state, write the National Information Center for Handicapped Children & Youth (NICHCY), PO Box 1492, Washington, DC 20013.

Several states have chosen to introduce voluntary mediation as another way of settling disputes between school systems and parents. In mediation, the people in a dispute ask a third party to decide their disagreement. Mediation is allowed as long as two conditions are met. First, parents are not forced to mediation either before or after filing a request for a hearing. Second, school systems may not as a result extend the 45 day time frame (from the date the school district receives the hearing request) for the issuance of the hearing decision.

Requesting a Due Process Hearing

A parent may initiate a due process hearing by filing a written request with the school district if:

(1) the school district proposes to initiate or change the identification, evaluation, or educational placement of a chlid;

(2) the school district proposes to initiate or change the provision of a free appropriate public education to a child (as described in the IEP);

(3) the parent requests and the school district refuses or fails to initiate or change the identification, evaluation, or educational placement of a child;

(4) the parent requests and the school district refuses or fails to initiate or change the provision of a free appropriate public education to a child (as described in the IEP); or

(5) the parent requests and the school district refuses or fails to amend the educational records of the child. (Hearings on this type of complaint are most frequently held under the U.S. Department of Education's regulations, on the Privacy Rights of Parents and Students. Copies of this regulation are available from the National Information Center for Handicapped Children and Youth, PO Box 1492, Washington, DC 20013.)

Federal courts have decided that parents whose children are no longer enrolled in the school district still

may use the due process procedure.

In fact, the U.S. Supreme Court decided in *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts* that a parent who initiates a due process hearing against a local school system may be able to have the school system pay them for the cost of the private school tuition if the judge or hearing officer determines that:

(1) the school district was not providing their child with a free appropriate public education;

(2) parents have enrolled their child in a private school during the period when the due process hearing or trial is pending; and

(3) the private school program provided for the child was appropriate.

A school district (or other public agency which is educating the child) may also begin a due process hearing by delivering to the parent a copy of a request for a hearing which has also been filed with the school system. A hearing may take place if:

(1) the school district requests and the parent refuses or fails to consent to a preplacement evaluation of the child;

(2) the school district requests and the parent refuses or fails to consent to the initial placement of a child in a program providing special education and related services; or

(3) the school district requests and the parent refuses or fails to consent to the disclosure or other proposed use of personally identifiable information.

When a school district receives a request for a hearing from a parent or sends a parent a copy of its request for a hearing, it must inform the parent of any free or low-cost legal services available in the area.

Designation of a Hearing Officer

Section 615(b)(2) of P.L. 94-142 states that the official who conducts the hearing, the hearing officer, may not be " . . . an employee of such agency or unit involved in the education or care of the child." It is not clear whether the law prohibits *any* employee of an agency involved in educating the child or just those who are *directly* involved in educating the child.

The P.L. 94-142 regulation (34 C.F.R. 300.507(a)(1)) appears to adopt the first interpretation (i.e., *any* employee of an agency which is involved). The U.S. Department of Education has consistently interpreted the statute to forbid the appointment of any officers or employees of a local school district which is in any way involved or of any other persons participating in setting the educational policy of the involved school district. A hearing officer should, however, not be considered an employee of the involved school district or SEA " . . . solely because he or she is paid by the agency to serve as a hearing officer." Federal courts have consistently followed this interpretation.

During the period 1977-1983, the U.S. Department of Education, however, interpreted the law to permit SEA employees, chief State school officers and members of State boards of education to serve as hearing officers under certain circumstances. In January 1983, citing a series of Federal court decisions adopting the general agency bar, the Department of Education in DAS Bulletin No. 107 advised SEAs that such employees could not serve as either hearing officers (in a one-tier approach) or as State impartial review officers (in a two-tier approach) because they were presumed to be involved in the education and care of all handicapped children in the state. Approximately one year later, the Department of Education (in Revised Bulletin No. 107) modified this position to allow SEAs the opportunity to overcome the presumption, i.e. that the use of agency employees is not appropriate, by demonstrating that the SEA " . . . has in effect formal written procedures which insure that accepted standards of procedural fairness and impartiality will be followed. . . ." The Revised Bulletin lists several criteria (demonstrating lack of involvement in the education and care of the child) which must be met.

In addition, the P.L. 94-142 Regulation also requires that a hearing officer not have a personal or professional interest which would make him or her favor one side or the other or be biased on any of the important questions involved in the hearing. For example, a person who had written articles expressing strong professional views on an evaluation or educational issue directly involved in the dispute would not be seen as "impartial." Similarly, a person with family or business connections with the parents or with directly involved school district officials would be disqualified.

Parents who believe that a person appointed as a hearing officer is not impartial for either of the reasons discussed above may ask the agency conducting the hearing to appoint another individual. If the agency disagrees and refuses to appoint a new hearing officer, the parent may file a complaint with the SEA under 34 C.F.R. 76.780 (as discussed above under *Other Methods for Obtaining Compliance)* or challenge the appointment in Federal court.

Each school district or other public agency which conducts due process hearings must maintain a list of persons who serve as hearing officers and the qualifications of each person.

Pre-Hearing Procedures

After a written request for a hearing has been received and a hearing officer has been appointed, the pre-hearing phase of the due process hearing system begins. During this phase, activities taken are intended to insure that: (1) the parents and the school district are able to gather and fully explore all pertinent information on the matters to be addressed by the hearing, (2) the legal issues or questions to be decided in the hearing are clearly defined, and (3) appropriate arrangements for conducting the hearing are made. As described earlier, voluntary mediation activities may take place during this period.

"Discovery" is a term used to describe the process by which both sides in a legal dispute (e.g. the parents and the school district) may collect relevant information from each other that they don't have already. As part of this process, each side can find out in advance the legal arguments and evidence that will be presented by the other. The only requirement of the Regulation is that

evidence which will be used at a hearing must be shared with the other side at least five days before the hearing.

In most states, State administrative rules are applied to hearings under P.L. 94-142. The rules usually include several ways for one side to discover information the other has, including:

(1) Depositions (an oral questioning of a party under oath, conducted by the attorney for the opposing party outside the courtroom. Depositions are recorded in a written or electronic transcript);

(2) Written interrogatories (a set of written questions posed by one party to the other which must be responded to in writing and under oath);

(3) Requests for the production of relevant records and documents (a request to one party by the other to produce documents and records for inspection and copying);

(4) Requests for inspection (a request usually by a parent to visit the school district and inspect facilities, equipment, materials, etc.); and

(5) Requests for admissions (requests that the other party, under oath, admit or deny certain claims about facts).

Where State administrative rules of procedure establish these and other discovery procedures, the hearing officer is usually assigned responsibility for supervising their use. For example, where a party believes that a request for information may cause too much of a burden or is not pertinent to the hearing, an objection to the request may be presented to the hearing officer for decision.

Many State administrative rules of procedure also provide for a Pre-Hearing Conference. Usually the conference is attended by attorneys for both sides and the hearing officer. However, where the parties are not represented by attorneys, the parties themselves will meet with the hearing officer. The purpose of the conference is to create a "blueprint" for the hearing. Specifically, most prehearing conferences include:

(1) Identification of the specific legal and factual issues to be addressed at the hearing.

(2) Identification of the documents to be used as evidence and the witnesses to be called by each side, as well as a summary of evidence to be provided by each document and witness.

(3) Establishment of the time and place of the hearing.

The P.L. 94-142 Regulation provides that both sides have the right to compel witnesses to attend the hearing. State procedures to compel witnesses to attend (by issuing subpoenas) are also used during the prehearing phase.

The Hearing

The P.L. 94-142 Regulation contains four basic requirements for the conducting of a due process hearing:

(1) The hearing must be conducted at a time and place which is reasonably convenient to the parents and child involved;

(2) Each party to the hearing has the right to be accompanied and advised by legal counsel and by other individuals with special knowledge or training with respect to the problems of handicapped children;

(3) Each party has the right to present evidence and cross-examine witnesses;

(4) A written or electronic word-for-word transcript of the hearing must be prepared and made available to both parties.

In addition, State administrative procedures often contain other requirements relating to the admission of evidence. Most of these provisions allow the hearing officer great freedom in deciding what evidence can be admitted (i.e., recorded in the hearing transcript and made part of the hearing record). In general, hearing officers are encouraged to admit rather than exclude evidence of questionable relevance. It is also customary to allow both parties to make both opening and closing statements. Testimony in the hearing is generally given under oath.

The P.L. 94-142 Regulation also provides that the parents shall determine whether the due process hearing is open to the public and whether the child shall attend.

The "burden of proof" is the legal responsibility to prove any factual issue which is contested in a hearing. The burden of proof is usually placed on the party requesting the hearing. However, P.L. 94-142 creates an exception to this general rule where issues of placement are raised. In this instance, whoever asserts that the child should be placed outside of the regular educational environment always has the burden of proof.

Either party may request the hearing officer to grant extensions of time for the conducting and completing of the hearing. An extension may cause the hearing decision to be sent to each of the parties after the 45-day time limit has passed.

Hearing Decision

A written final decision must be mailed to both parties by the hearing officer no later than 45 days after the request for hearing or the "complaint" has been received by the local school district or other public agency conducting the hearing. The hearing decision must contain findings of fact and decisions regarding each of the legal issues or questions addressed in the hearing.

The hearing officer must also supervise the preparation of the hearing transcript and it must be made available to the parties at the same time the hearing decision is sent.

The hearing decision is considered final (i.e., not subject to subsequent appeal) unless appealed to the SEA within the time period set by State administrative procedures. Federal courts have consistently held that State time limits for appeal must allow both the parents and the school district a reasonable opportunity to review the hearing decision and the transcript.

SEA Impartial Review

Any party who disagrees with the hearing officer's decision about the facts of a case and how the law applies to those facts may appeal to the SEA. If the decision is appealed, the SEA must designate a person to conduct an impartial review of the hearing decision.

In designating the official or other person to conduct an impartial review, the SEA must follow the same standards for determining impartiality (discussed above) which are used in the appointment of hearing offi-

cers. As required by Revised Bulletin No. 107, SEA employees, chief State school officers and State board members may only serve as impartial review officials if they can show the general assumption that they are "involved in the education and care of the child" is not valid.

In conducting the impartial review, the official must examine the entire hearing record (including the hearing decision, the hearing transcript, and all documents used as evidence) to determine the validity of decisions made by the hearing officer. In addition, the reviewing official must review the record to insure that the procedures at the hearing were consistent with all the Federal and State due process requirements.

Where the reviewing official believes it necessary, additional evidence may be collected and a second hearing may be held following the procedures described earlier. The reviewing official may allow both parties to make oral and/or written presentations.

Within 30 days after the SEA receives a request for an impartial review (unless either party asks for an extension and it is given), the reviewing official must make (and send to both parties) an independent decision, including written findings about the facts of the case and how the law applies to them. The impartial review official is not required to rely on the hearing decision and is expected to make an independent decision based on the hearing transcript or evidence collected during the impartial review.

The decision made by the hearing officer conducting the impartial review is final unless appealed to a Federal or State court. Attempts by a few states to insert an additional SEA review, after the impartial review decision, have been declared invalid by the Federal courts as violating the finality requirement.

Review by State and Federal Courts

A party who disagrees with the decisions made by the impartial review official (or in a one-tier system, by the hearing officer) may file a law suit in either State or Federal court to challenge the decision already made. While suits may be brought in either State or Federal court, a suit may not be filed in both courts.

State administrative procedures may specify the deadline for appeal but may not restrict the time for filing an appeal to the Federal courts to less than the usual time set by law. In contrast, State procedures may expand the time for appeal beyond the Federal statutory period.

The P.L. 94-142 Regulation does not set a standard by which courts are to review hearing decisions and impartial review decisions. Most Federal courts which have considered standards for review have concluded that Federal and State courts should uphold SEA impartial reviews when they are supported by substantial evidence. In contrast, the courts have concluded that the findings of hearings conducted by local school districts are not entitled to any legal weight.

Attorney's Fees

On August 5, 1986, President Reagan signed into law the Handicapped Children's Protection Act of 1986 (P.L. 99-372). The Act amends P.L. 94-142 to allow the award of fees and other costs to parents who win either due process hearings or court cases. For information on the interpretation of this statute contact your state's Protection and Advocacy agency. For the address of your state's Protection and Advocacy agency write: National Information Center for Handicapped Children and Youth, PO Box 1492, Washington, DC 20013.

Child's Status During Hearings

The P.L. 94-142 Regulation provides that while a decision of both the administrative or judicial review of a hearing complaint is pending, the child shall remain in his or her present placement (if out of school, the child must be placed in the regular school program) unless the school district and the parents agree to another placement.

Last year, however, the U.S. Supreme Court in its decision in the *Burlington* case significantly modified this requirement. The Court held that school districts may be liable to the parents of a handicapped child who are asserting in a hearing that the local school district has failed to provide the child with a free, appropriate public education. Liability arises when the parents withdraw the child from public school and enroll the child in a private school during the pendency of the administrative and judicial proceeding. If the parents subsequently prevail in the hearing and it is demonstrated that the private school program is appropriate, then the school district is liable under P.L. 94-142 to the parents for the full cost of private school tuition.

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